ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	RM No. 8775
Petition for Declaratory Ruling,	)	
Special Relief, and Institution	)	
of a Rule Making Proceeding by	)	
America's Carriers Telecommunications	)	
Association	)	
	)	

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JOINT OPPOSITION OF
VOCALTEC LTD. AND
QUARTERDECK CORPORATION

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SUMMARY

VocalTec Ltd. and Quarterdeck Corporation (the "Respondents") are strongly opposed to the petition filed by the America's Carriers Telecommunications Association ("ACTA"), a trade association representing small long distance companies. In its petition, ACTA argues that the Commission should regulate as interexchange carriers certain developers of computer software that enables consumers to talk to each other via the Internet. Specifically, ACTA contends that the Commission has authority to regulate the Internet and should exercise such jurisdiction over Internet Voice Software Developers ("IVSDs").

The Commission, however, lacks jurisdiction to regulate IVSDs or IVSD software. Because IVSD software and IVSDs are Access Software and Access Software Providers, respectively, as defined by the Telecommunications Act of 1996 ("1996 Act"), no express authority exists under the Act for their regulation. Moreover, the Commission may not assert ancillary jurisdiction over IVSDs or IVSD software in light of Congress's clear intent to permit the Internet to remain deregulated and its mandate that Interactive Computer Services, which encompasses Access Software Providers, shall not be treated as common carriers or telecommunications carriers.

Even if the Commission finds that it has jurisdiction over IVSD software and IVSDs, it should extend to them the same deregulatory policy it has

long applied to Customer Premise Equipment ("CPE") and enhanced services. The policy objectives expressed by Congress to enable the Internet to continue to develop and to preserve a vibrant and competitive free market "unfettered by Federal or State regulations" require the Commission to afford IVSD software and IVSDs similar treatment as CPE and enhanced services. Any decision in this proceeding to regulate IVSDs would constitute a grave misstep tantamount to the reregulation of CPE. Therefore, the Respondents submit that the grant of the ACTA petition would greatly disserve the public interest and should be denied.

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VocalTec Ltd. ("VocalTec") and Quarterdeck Corporation ("Quarterdeck") (collectively, the "Respondents"), by their attorneys, submit this Opposition in response to the America's Carriers Telecommunication Association Petition ("ACTA Petition") in the above-captioned proceeding.

STATEMENT OF INTEREST

VocalTec and Quarterdeck are developers of software that enables voice, text and audio communications over the Internet. Accordingly, Respondents have an interest in this proceeding.

INTRODUCTION

ACTA is a trade association representing small long distance companies. ACTA argues in its Petition that the Commission should regulate as interexchange carriers ("IXCs") certain developers of computer software that enables consumers to talk to each other via the Internet. Specifically, ACTA contends that the Commission has authority to regulate the Internet and should exercise such jurisdiction over Internet Voice Software Developers ("IVSDs"). In addition, ACTA contends that it would disserve the public interest to allow IVSD software to be "given away" while IXCs must shoulder the burden of maintaining the telecommunications infrastructure. Therefore, ACTA requests that the Commission commence a rule making proceeding regarding the regulation of IVSD and order IVSDs immediately to cease distributing such software until the Commission completes such an IVSD rule making proceeding.

The Commission must reject ACTA's requests. The Commission cannot satisfy the applicable legal test for asserting jurisdiction to regulate IVSDs as IXCs. In addition, even if the Commission could validly assert such jurisdiction, IVSD software more closely fits the definition of deregulated Customers Premises Equipment ("CPE") than the broad definitions of Telecommunications, Telecommunications Carriers or Telecommunications Services.

BACKGROUND

I. The Internet and the Growth of the Related Industry

The Internet has been compared to an Information Superhighway in which forms of communication, rather than people, travel around the world. Datapackets travel like vehicles along highways comprised of high-bandwidth long distance telephone cables, transmitting data at speeds up to 32Mb per second. Off-ramps and side roads from the high-speed cables connect to leased lines ranging in capacity from 64Kb to 2Mbs. Ultimately, the side road leased lines lead to the individual driveways of each personal computer ("PC") user's individual dial-up connection.[1]

The Internet began as an initiative of the Department of Defense's Advanced Research Projects Agency ("ARPA") in the 1960s to create a communications system that could withstand a nuclear attack.[2] By 1969, DOD began "ARPANet" -- a packet-switched network comprised of computers based at military sites and certain civilian research sites.[3] ARPA devised a standard networking protocol known as transmission control protocol and Internet protocol

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1 *The Internet in 1996 - An Investment Perspective*, Intervid at xiv (Durlacher Ltd, January 1996) ("Intervid").

2 U.S. Investment Research, Technology/New Media-The Internet Report, 2-1 (Morgan Stanley, December 1995) ("Morgan Stanley Report").

3 Id. See also See *Where It Came From, How It Grew*, 10 ABI/INFORM 4, (AT&T Bell Laboratories,1995) ("ABI/INFORM").

("TCP/IP").[4] As a protocol standard, TCP/IP enabled every computer interconnected with the ARPANet to communicate on the network regardless of its operating system.[5] During the 1980s, the National Science Foundation initiated the NSFNet, a series of high-speed (56 kbps) networks connecting to the NSF's supercomputers, while the military shifted its network operations to its own Defense Data Network.[6] At this stage, what we know of today as the "Internet" arose from the NSFNet, together with other governmental backbone facilities.[7] Critical to the creation of today's Internet, however, was the NSF's decision in 1988 to allow commercial networks to connect to the Internet.[8]

The following year, 1989, the World Wide Web ("Web") was developed for improved network communications among its scientists at a Swiss

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4 Morgan Stanley Report at 2-1.

5 ABI/INFORM at 4.

6 Morgan Stanley Report at 2-1.

7 Id. at 2-2.

8 MCIMail was granted permission in 1988 to connect to the Internet, followed in 1989 by CompuServe, ATTMail and Sprintmail ("Telemail"). Id. As of Autumn 1995, commercial users outnumbered research and academic users by a two-to-one ratio. See ABI/INFORM at 4. Due to the NSF's charter to support non-commercial activities and the recent increased use of the Internet by commercial entities, the NSF has recently limited its financial support to the Internet to infrastructure improvements.

nuclear supercollider facility.[9] The Web is a network/server which combines a set of standards for information access and a graphical interface with which to navigate the Internet.[10]

In 1993, the first Web browser was developed to facilitate search and cataloging functions for the Internet user. With the introduction of Web browsers by Quarterdeck, Netscape Communications Corporation and Microsoft Corporation, among others, the demographics of Internet users have broadened from a small pool of government researchers and academics to a rapidly expanding universe of consumers with minimal computer knowledge. For example, according to one estimate, the number of "Web sites" or servers grew from 22,000 in May 1995 to over 100,000 in November 1995.[11]

Another source of the growth in Internet users is proprietary networks such as America Online ("AOL"), CompuServe and Prodigy. These services rely on the Internet's infrastructure to create unique subscriber-based networks in which members can retrieve and interact with brand-named content

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9 Morgan Stanley Report at 2-2; Intervid at xiv.

10 Intervid at xiv. The Web enables users to find, retrieve and link information in a consistent manner, and can be used for sending text, graphics, sound and video over the Internet, and can be used to see, hear and manipulate the files in real time. *The Internet, Webbing the Information Economy* at 8, (Habrecht & Quist LLC, September 1995) ("H&Q Report").

11 Intervid at xiv (citing to Forrester Research).

resources, communicate with other members and obtain access to the Web, in return for which subscribers pay a monthly fee that correlates to the services they utilize and the amount of time they spend online. According to one source, the number of U.S. subscribers to such services has grown from a base of 9.6 million in 1995 to 35.2 million in the year 2000, or 34 percent of all households in the U.S.[12] Other entities such as Netcom and AT&T Worldnet provide purely non-proprietary access directly to the Web for essentially a monthly flat rate.[13]

The growth in use of the Internet has improved opportunities for developers of innovative Internet software applications.[14] For example, in 1995 Netscape Communications Corporation created the Web browser "Netscape Navigator."[15] Similarly, several software developers recently introduced software that enables PC users to engage in real-time voice conversations over

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12 *Total Online Households in the U.S. to Reach 35 Million by the Year 2000*, Jupiter Report at 1 (Jupiter Communications 1996).

13 The subscriber base of NetCom grew 174 percent to 200,000 between January and September of 1995. ABI/INFORM at 4.

14 By one estimate, the market for Internet-based content and activities (including software applications) will expand from less than $100 million presently to over $10 billion by the end of the decade. H&Q Report at 7. See also *The Browser War*, Newsweek at 47-50 (April 29, 1996).

15 *The Internet Goes Commercial*, 18 Database 72 (Information Access Company, December 1995).

the Internet. The Respondents are the developers of the two such premiere Internet phone software programs.[16]

II. The Respondents

A. VocalTec

VocalTec was founded in 1989. Its core software product, Internet Phone 3.2 ("Internet Phone™"), was introduced in February 1995. To utilize the Internet Phone™ software, two users each must have personal computers ("PCs") meeting certain minimum performance specifications, each with Internet Phone™ software and a Web browser installed. Each user also must subscribe to both an Internet access provider such as AT&T Worldnet, MCI, AOL or CompuServe, and a provider of basic telephone service. With the Internet Phone™, two PC users with VocalTec's software installed on their Internet-connected PCs can conduct real-time, two-way, full-duplex voice conversations.

Internet Phone™ users first log onto VocalTec's address server where Internet Phone™ users are identified by a short nickname and an user name. To initiate an Internet Phone™ conversation, both parties should be listed in a server, where one user may initiate the connection by finding and clicking on

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[16] See *Internet Phones - The Future is Calling*, Internet World at 40-52 (June 1996) (wherein Internet World tested eight different Internet phone software programs and determined that the two best software programs were those developed by VocalTec and Quarterdeck).

the other user's name.[17] More recently, VocalTec has introduced Internet Wave™, or I-Wave™, which provides users with a means to transmit shows, lectures, music and more in a high-quality audio format to Internet users world-wide.[18] VocalTec's software development efforts stem from one of the first text-to-speech systems that produced human-sounding speech, developed for the visually impaired. In 1993, VocalTec developed innovative software called VocalChat™ that enabled real-time voice communications over local or wide area networks.

B. Quarterdeck

Quarterdeck Corporation ("Quarterdeck"), founded in 1982, is a leading developer of a variety of computer software products and computer utility products, such as Quarterdeck Expanded Memory Manager ("QEMM®"), Internet "browsers" for exploring the Web ("Quarterdeck Mosaic™"), and other Internet-related applications. Quarterdeck introduced its Internet voice software, WebTalk™ 1.0 ("WebTalk™"), in November 1995. With WebTalk™, two PC

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[17] VocalTec Internet Phone™, expected to be introduced in the near future, will enable parties to contact each other via the addressing server or directly via each user's Internet protocol address.

[18] The I-Wave™ has two main components: (1) a server package that includes an encoder and that works in conjunction with standard Web servers, and (2) the I-Wave™ Windows-compatible application that enables users to listen to I-Wave™ transmissions from their Web browsers. Unlike Internet Phone, however, I-Wave™ does not enable users to engage in real time, full duplex voice communications.

users can engage in real-time, two-way, full-duplex voice conversations over the Internet. Like VocalTec's Internet Phone™, WebTalk™ requires that two users subscribe to both an Internet access provider and a provider of local exchange service, have PCs that meet certain minimum performance specifications, and have WebTalk™ and Web browser software installed. WebTalk's™ interface integrates Web "chat room" and e-mail functions by allowing users to put their e-mail and home page addresses on their online profile. In this manner, a user of WebTalk™ software can send e-mail, communicate by text, or connect to another user's home page simultaneously with voice conversation over the Internet. To find other WebTalk™ software users to talk with, a user must first log on to a Web site (http://webtalk.qdeck.com) using a version of the program that serves as a helper application to the user's Web browser, then launch the WebTalk™ User Directory -- a "chat room" manager that enables the user to connect with someone already online or to create a new "private room."[19]

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[19] A "chat room" is a location in which PC users can engage in text or voice communications. A "public room" is a room with unrestricted access, while a "private room" is a room created by a particular user who can restrict access to certain other users. Unlike e-mail, chat room communications do not travel directly from one end user's PC to another, but rather meet at a single intermediate location (i.e., a designated computer server) under the control of a third party. Chat rooms are frequently labeled by a particular topic or interest. See, e.g., Internet World, Vol. 7 at 40-54 (June 1996).

ARGUMENT

I. The Commission Lacks Jurisdiction Over Internet Voice Software Developers

Although the Commission has never asserted jurisdiction over the Internet, IVSDs, or IVSD software, the ACTA Petition contends that the Commission has authority under the Communications Act of 1934, as amended, to regulate IVSDs as common carrier providers of interexchange services pursuant to Section 151 of the Communications Act.[20] Section 151 of the Communications Act states that:

> [f]or the purpose of regulating interstate . . . commerce in communication by wire . . . there is hereby created a commission to be known as the 'Federal Communications Commission' . . . which shall execute and enforce the provisions of this Act.[21]

Contrary to the ACTA Petition's contention, Section 151 is merely a statement of Congress's purpose in creating the Commission and is not an independent source of Commission authority.[22]

In contrast, Section 152 (which the Petition fails to cite) states that the Communications Act's provisions "shall apply to all interstate . . . communi-

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20 Petition at 5 (citing 47 U.S.C. § 151).

21 47 U.S.C. § 151(a).

22 See U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968).

cation by wire . . . which originates and/or is received within the United States." This general grant of authority, however, in light of the express intent of Congress contained in the 1996 Act, fails to provide the Commission with jurisdiction to regulate IVSDs as requested by ACTA.

In Southwestern, the Court found that where other provisions of the Communications Act fail expressly to provide authority over the activities concerned, the Commission may assert "ancillary jurisdiction" pursuant to Section 152(a) provided that (1) such jurisdiction is "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of [the entities concerned] . . . as public convenience, interest, or necessity requires," (2) such jurisdiction is not inconsistent with law,[23] and (3) there is no compelling evidence that Congress intended to restrict the agency's jurisdiction over the activities concerned.[24]

As Respondents demonstrate below, no other provisions of the Communications Act provide the Commission with jurisdiction to regulate the Internet generally or IVSDs and IVSD software specifically. In fact, the statute reflects Congress's express mandate that the Internet, including "Access Software Providers" and "Interactive Computer Services," be exempt from Commission or

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[23] Id. at 167-68.

[24] Id. at 177-78.

other regulation. Because of the clear evidence in the Communications Act of Congress's intent to preclude the FCC's regulation of IVSDs, the Commission fails to meet Southwestern's test for ancillary jurisdiction, and therefore must deny the ACTA Petition.[25]

A. The Communications Act Expressly Precludes Commission Jurisdiction to Regulate IVSDs as IXCs

In order for the Commission to rely solely upon Section 152(a) for jurisdiction, the Commission must demonstrate that it has ancillary jurisdiction pursuant to Southwestern. The 1996 Act, however, reflects clear Congressional intent to continue the exclusion from Commission and state regulation all Internet-related communications and services, including the development and distribution of IVSD software. Indeed, Congress explicitly admonished the Commission that, under Section 223(e)(6) of the 1996 Act, "[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers." 47 U.S.C. § 223(e)(6) (emphasis added).[26]

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[25] Southwestern, 392 U.S. at 177-78.

[26] Grant of the ACTA Petition's request, therefore, would directly conflict with Section 223(e)(6). If other sections of the Communications Act were intended to treat Interactive Computer Services (including Access Software Providers) as carriers, then Congress would have had no basis to clarify in Section 223(e)(6) that such entities should not be regulated as common carriers.

The relevant definitions for IVSDs and IVSD software are contained in Section 230(e) of the 1996 Act. Specifically, Section 230(e)(2) of the 1996 Act defines an "Interactive Computer Service" as follows:

> INTERACTIVE COMPUTER SERVICE.-The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.[27]
>
> . . .

Similarly, Section 230(e)(4) defines an "Access Software Provider" as follows:

> (4) ACCESS SOFTWARE PROVIDER.-The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:
>
> (A) filter, screen, allow, or disallow content;
>
> (B) pick, choose, analyze, or digest content; or
>
> (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.[28]

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[27] 47 U.S.C. § 230(e)(2) (emphasis added).

[28] 47 U.S.C. § 230(e)(4) (emphasis added).

As a factual matter, IVSD software involves the "Internet" as the term is defined by the 1996 Act.[29] In addition, IVSDs fall squarely under the 1996 Act's definition of "Access Software Providers" because they provide software that enables users to "transmit" and "receive" "content." As an Access Software Provider, IVSDs would also fall under the definition of providers of "Interactive Computer Services" because the IVSD software, together with the other requirements necessary to make IVSD software function, "provides or enables computer access by multiple users to a computer server."

ACTA, on the other hand, contends that certain provisions in the 1996 Act confer authority on the Commission to regulate IVSDs under the broad definitions of "Telecommunications Service" and "Telecommunications Carriers." This contention directly conflicts with the Congressional mandate under the more specific Internet-related provisions of the 1996 Act, namely Sections 223(e)(6) and 230(e), stating that Interactive Computer Services (and hence Access Software Providers) are not Telecommunications Carriers.

The Supreme Court has recognized that the "specific terms covering the given subject matter will prevail over general language of the same or

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[29] The Internet is defined as "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(e)(1).

another statute which might otherwise prove controlling."[30] Pursuant to this principle of statutory interpretation, the specific Internet-related terms of Section 230 of the Communications Act must prevail over the broad, general provisions of Sections 153(a)(2)(48), (49) and (51) defining Telecommunications, Telecommunications Carriers and Telecommunications Services.

Indeed, the more general definition for Telecommunications Service does not apply to IVSDs. IVSDs do not provide a Telecommunications Service, i.e., they do not transmit information. In addition, because IVSD software cannot function without the user subscribing to other third party service providers, IVSDs do not offer "telecommunications directly to the public." At the most, IVSDs indirectly enhance the quality and functionality of voice communications delivered directly by third parties.[31] Moreover, IVSDs do not offer any service "for a fee," but rather merely offer their software through retail distribution points for a one-time purchase price, and without any charge through Internet

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[30] Kepner v. United States, 195 U.S. 100, 124, (1904); AT&T v. FCC, 487 F.2d 865, 877 (2d Cir. 1973).

[31] Similarly, for example, software programmed within a digital PCS handset that enables it to deliver facsimile transmissions enhances the quality and functionality of mobile communications, but such software, in and of itself, does not constitute a service.

"bulletin boards" for a trial period. In short, IVSDs do not provide Telecommunications Services.[32]

On the other hand, the more specific definition of Access Software Provider does not involve the delivery of Telecommunications (or any other service) directly to the public for a fee, but rather involves a provider of software or "enabling tools" to transmit or to receive content. Therefore, by enacting each of these provisions together in the 1996 Act, Congress has distinguished between the general definitions of Telecommunications, Telecommunications Service, and Telecommunications Carriers and the specific Internet-related definitions covering IVSD software and IVSDs in Section 230. Accordingly, as a matter of statutory interpretation, the broad telecommunications-related definitions cannot be read to confer authority upon the Commission to regulate IVSD software and IVSDs in the same manner as IXCs.[33]

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[32] Thus, even if the Commission, contrary to the unambiguous Congressional intent expressed throughout Sections 223(e)(6) and 230 of the 1996 Act, were to classify the service provided by Internet access providers, such as AOL, as Telecommunications Service and subject them to common carrier regulation, such a classification could not apply to IVSDs.

[33] In addition, as intellectual property subject to full copyright protection, IVSD software by definition cannot be a service. Under federal copyright laws,

> (a) Copyright protection subsists . . . in original works of authorship <u>fixed in any tangible medium of expression</u> . . .

(continued...)

II. Even if the Commission Could Assert Its Ancillary Jurisdiction, IVSD Software Is Substantially Similar to CPE and Therefore Should Not Be Regulated by The Commission

Even if the Commission were to find it has jurisdiction to regulate the Internet generally or IVSDs specifically, it should exercise that jurisdiction in the same fashion as it has for Customer Premises Equipment ("CPE") and enhanced services. Namely, it should deregulate Internet-related services, specifically including Access Software Providers and Interactive Computer Services, at both the federal and state levels.[34]

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[33](...continued)

(b) In no case does copyright protection for an original work of authorship extend to any . . . procedure, process, system . . ."

17 U.S.C. §§ 102(a) and (b) (emphasis added). A service is defined in common usage as "a system for providing people with some utility, such as gas or water." Webster's New World Dictionary (1990). A service, therefore, is excluded from protection under federal copyright laws because it cannot be "fixed in any tangible medium of expression" and it falls under the excluded categories of Section 102(b) of the Copyright Act of 1976, as amended. IVSD software, by contrast, enjoys copyright protection because it is fixed in a computer language which creates the IVSD software's unique structure, sequence and organization. See, e.g., Apple Computer, Inc. v. Formula Intern. Inc., 725 F.2d 1240 (1984). IVSD software, therefore, is not a service.

[34] The ACTA Petition also contents that IVSDs are intrastate telecommunications carriers subject to regulation by state public utility commissions. ACTA Petition at 6, n.3. This argument is flawed because Section 230(d)(3) of the Communications Act, as amended by the 1996 Act, states that "No cause of action may be brought and no liability may be imposed under an State or local law that is inconsistent with this Section." 47 U.S.C. § 230(d)(3) (emphasis added). State regulation of IVSDs as intrastate telecommunications carriers

(continued...)

Indeed, IVSD software is more analogous to CPE than Telecommunications Equipment or Service. Specifically, CPE is defined as follows:

> (38) CUSTOMER PREMISES EQUIPMENT.- The term 'customer premises equipment' means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.[35]

IVSD software provides a user with the means to originate and terminate communications where the user has a PC (1) that meets certain performance specifications with compatible IVSD application software installed and (2) that is connected to the Internet. Thus, IVSD software, like traditional CPE, is employed on the premises of the user and not on the premises of any software developer (such as VocalTec or Quarterdeck), the premises of any Internet access provider, or the premises of any carrier. Therefore, contrary to the ACTA Petition, IVSD software is more analogous to CPE than Telecommunications or Telecommunications Services.[36]

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[34](...continued)
would also contravene the express Congressional findings and policies set forth in Sections 230(a), (b) and (e) providing for, among other things, preservation of the Internet "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

[35] 47 U.S.C. §§ 153(38), and (51).

[36] Even the CPE definition is not a perfect fit in that, unlike a phone or PC, the IVSD software cannot itself originate, route, or terminate a call. Hence, the most probable classification intended by Congress was to classify IVSD software as an Interactive Computer Service. See supra pp. 12-16 discussing Sections 223(e)(6) and 230 (a), (b) and (e).

Manufacturers and distributors of CPE are not regulated by the Commission as carriers. In fact, the Commission has explicitly deregulated the provision of CPE in both the landline and wireless contexts and has expressly preempted the states from regulating the provision of CPE.[37] To the extent the Commission determines that it can assert jurisdiction over IVSDs, then it should treat them as it has treated other CPE providers by implementing a policy of comprehensive deregulation. This deregulatory approach to CPE was adopted by the Commission to promote competition and lower prices in the CPE market.[38] This approach would specifically coincide with the

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[37] See Amendment of § 64.702 of the Commission's Rules & Regulations, 77 F.C.C. 2d 384, 388 (1980) ("Second Computer Inquiry"); Computer and Communications v. FCC, 693 F.2d 198, 210 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) (stating that "the severability of CPE from underlying carrier transmission services, demonstrated by healthy competition in the CPE market by non-carriers . . . supports the Commission's conclusion that CPE is not a common carrier activity within Title II"); and Cellular Communications Systems, 86 F.C.C. 2d 469, 497 (1981) ("[b]ecause] cellular service is a new service for which its mobile equipment has never been tariffed, [the Commission] will require that it be unbundled and detariffed from the start").

[38] See AT&T Co.'s Proposed Tariff Revisions in Tariff F.C.C. No. 263 Exempting Mebane Home Telephone Co. of North Carolina from the Obligations to Afford the Customers the Option of Interconnecting Customer-Provided Equipment to Mebane's Facilities; AT^T Transmittal No. 12321, 53 F.C.C. 2d 473, 476-77 (1975). The FCC mandated deregulation of CPE to promote competition in the CPE market even though its decision clearly harmed the revenue-generating potential of the pre-divestiture dominant CPE manufacturer, AT&T. Therefore, the ACTA Petition's claim that regulation of the CPE-like IVSD product is necessary because it is harming the revenue-generating potential of IXCs is not a sufficient basis to commence regulation.

Congressional directive "to promote the continued development of the Internet and other interactive computer services . . . unfettered by Federal and State regulation."[39]

The Commission also adopted a similar deregulatory approach to the provision of "enhanced services" to serve the goal of competition.[40] For example, in the Third Computer Inquiry, the Commission decided to continue to treat all protocol processing functions as unregulated enhanced services because such deregulation "will more effectively promote a competitive environment for the provision of protocol processing."[41]

The lack of governmental regulation of IVSD software has facilitated the unfettered and rapid growth of the nascent Internet software market and, by extension, increased the number of domestic high technology

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39 47 U.S.C. §§ 230(b)(1), (2).

40 The Commission defines "enhanced services" as "services offered over common carrier transmission facilities, which employ computer processing applications that act on the format, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

41 In the Matters of Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations, *Report and Order*, 2 FCC Rcd 3072, 3073 (1987).

jobs. By contrast, commencing regulation of IVSD software would conflict with the Commission's existing policy concerning CPE and enhanced services and could curtail the development of the Internet software industry. Indeed, the Commission should no sooner assert jurisdiction over the software involved in IVSD then it should over the PC, microphone or other associated equipment used in connection with IVSD software to communicate over the Internet.

Accordingly, because IVSD software more closely resembles the definition of CPE than the telecommunications service-related definitions in the 1996 Act, the Respondents submit, that to the extent that the Commission finds it can assert jurisdiction over IVSDs, the Commission should reject the ACTA Petition and deregulate IVSDs at both the federal and state levels. Any other course of action would directly contravene unmistakable Congressional directives in Sections 223 and 230 to exclude IVSDs and the Internet from regulation.[42]

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[42] In fact, consistent with such Congressional directives, even if the Commission were to classify IVSD software as Telecommunications Equipment, or IVSDs as Telecommunications Service providers, it must forbear from regulating them under Title II of the Communications Act pursuant to Section 160 consistent with Congress's directives in Section 230. 47 U.S.C. §§ 160(a) and 230.